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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 12

THE WESTERN PACIFIC RAILROAD, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

OPINIONS AND ORDERS BELOW

The opinion of the United States District Court for the Northern District of California, Southern Division (R. 729-734) is reported at 230 F. Supp. 852. The opinion and order of Division 2, Interstate Commerce Commission (R. 623-646) are reported at 316 I.C.C.

795, and the Commission's order denying further hearing appears at R. 646-647. The Recommended Report and Order of the Hearing Examiner appears at R. 649-655.

JURISDICTION

This suit was brought under 28 U.S.C. §§ 1336, 1398, 2284, 2321-25, and 5 U.S.C. § 1009 to enjoin, set aside and annul a report and order of the Interstate Commerce Commission. The decision of the three-judge District Court (R. 729-734) was dated June 19, 1964, and filed June 22, 1964. Notice of appeal was filed in that court by appellants here on August 17, 1964. R. 735-739. This Court noted probable jurisdiction on January 18, 1965. R. 742; 379 U.S. 956.

The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156 (1962), and *American Trucking Ass'ns* v. *United States,* 326 U.S. 77 (1945).

QUESTION PRESENTED

The Western Pacific Railroad Company makes up the middle segment of a railroad through route (the Bieber route) which has been created, established, and maintained as a single unit extending between Portland, Oregon, and Los Angeles, California, for the purpose of providing railroad competition with the Southern Pacific route—the only other north-south railroad route serving the Pacific Northwest and the State of California. Union Pacific Railroad and Northern Pacific Railway, although establishing and maintaining with the Southern Pacific Company a system of

through routes and rates via the Portland Gateway (the common point of interchange between Union Pacific, Northern Pacific and Southern Pacific on the one hand and the Bieber route on the other), have refused to establish a similar system with the Bieber route and have thus discriminated against Western Pacific on traffic moving through that interchange.

The question is whether Western Pacific is a "connecting line" within 49 U.S.C. § 3(4), which prohibits discriminatory rates and practices between "connecting lines", even though Western Pacific does not have a direct physical connection with Union Pacific and Northern Pacific at the common Portland Gateway and even though Western Pacific has not in the past, because of the discrimination, been permitted to make up a through route through the common interchange point of Portland.

STATUTES INVOLVED

The National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding §§ 1, 301, 901 and 1001:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly au-

thorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3(4) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. § 3(4):

> Interchange of traffic. All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

STATEMENT

On February 10, 1961, the Western Pacific Railroad Company and its subsidiary lines[1] filed a complaint with the Interstate Commerce Commission (ICC)

[1] Western Pacific is treated throughout this brief as encompassing its subsidiary lines, the Sacramento Northern Railway and the Tidewater Southern Railway Company. See R. 1-2.

charging the appellees[2] with violations of §§ 1(4)[3] and 3(4) of the Interstate Commerce Act, 49 U.S.C. §§ 1(4), 3(4), and with actions contrary to the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1. R. 1-8. The Hearing Examiner found in favor of Western Pacific and issued an order recommending that the appellees be required to cease their discriminatory practices which were in violation of § 3(4) of the Act. R. 649-655. A division of the ICC reversed, holding that since Western Pacific neither enjoyed a direct physical connection with Union Pacific and Northern Pacific, nor already participated in a full line of "through rates" with these carriers, Western Pacific was not a "connecting carrier" within the meaning of § 3(4) and therefore was without power to challenge the discriminatory practices. R. 623-645. The full Commission certified the case as "of general transportation importance" (R. 541) but declined to grant further hearing. R. 646. Western Pacific appealed to the three-judge United States District Court for the Northern District of California, which agreed with the Commission's analysis of "connecting line" status, denied Western Pacific's petition, and dismissed the

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[2] The Union Pacific Railroad Company, the Northern Pacific Railway Company and their shortline connections were named as defendants and are commonly referred to throughout this brief as appellees. The Great Northern Railway Company and The Atchison, Topeka & Santa Fe Railway Company (Santa Fe) were also named as defendants, since the prayer for relief requested a prescription of through routes to which they would be a party, but they were not defendants in opposition and pleaded in support of Western Pacific. R. 1-2, 8, 11. Southern Pacific Company intervened in support of the defendants in opposition. R. 14.

[3] Appellants later chose to rely entirely upon § 3(4), and therefore the § 1(4) allegations are no longer part of the case.

complaint. R. 729. On appeal from the District Court, this Court noted probable jurisdiction. 379 U.S. 956 (1965).

For many years prior to 1931, the only railroad route serving the Pacific Coast of the United States (including the States of Washington, Oregon, western Idaho and California) was Southern Pacific Company and its connections. But by the late 1920's and early 1930's, the necessity for competitive service prompted a group of railroads to apply to the Interstate Commerce Commission for permission to construct a short segment of railroad between Klamath Falls, Oregon, and Keddie, California, the purpose of which was to open up a whole new through route paralleling the Southern Pacific route. *Great Northern Ry. Construction,* 166 I.C.C. 3 (1930), 170 I.C.C. 399 (1931). The application of these railroads was supported by 66 intervening parties and was opposed by only 15.[4]

The supporters successfully stressed several reasons why new facilities were needed. The vice president of the Weyerhauser Timber Company, for example, stated that his operation would benefit from access to new markets which the proposed route would provide. 166 I.C.C. at 31. And the president of the Public Utilities Commission of Idaho observed that " * * * the new line will promote an exchange of commodities between

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[4] Support included the railroad or public service commissioners of Arizona, California, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, Washington, and Utah; the counties of Lassen, Plumas, and Sutter, California, Klamath, Oregon, and Salt Lake, Utah; the City of Oakland, California, Salt Lake City, Utah, and the City and County of San Francisco; and the Chambers of Commerce of San Francisco, Oakland, Stockton, Bend, and Tacoma. 166 I.C.C. at 6.

Idaho and California and other southwestern states, by reason of a shorter haul, quicker service, and a consequent lowering of freight rates * * *." *Ibid.* The overwhelming weight of the testimony convinced the ICC of the need to construct the alternate route:

> Compared with the benefits which will accrue to the people of the Pacific West and Northwest through the establishment of new competitive routes, stimulating the interchange of products, the advantage of a diversified car supply, additional passenger service, and the development of the local territory, the moderate capital expenditure here proposed seems amply justified.[5]

As the ICC pointed out, an important purpose of the new service was the competition it would provide for existing routes, specifically that of the Southern Pacific.[6] Another vital factor stressed by the ICC was the potential establishment of joint rates and through

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[5] *Id.* at 39. The ICC also noted that: "San Francisco and Portland are now connected directly by the rails of but a single carrier. The California Railroad Commission points out that this dependence upon the ability of a single rail carrier is without parallel as between comparable agricultural and industrial centers anywhere in the United States. [*Id.* at 33.] * * * The proposed line would give that much more transportation and furnish an alternate route should an existing line be broken." *Id.* at 37.

[6] 166 I.C.C. at 33. "The new line will aid in the development of a great timber area and some considerable agricultural areas in northern California. As we said in *Construction of Lines in Eastern Oregon,* 111 I.C.C. 3, 37, 'Advantages to the shippers of an additional outlet for their product are apparent. It is desirable that transportation facilities of a high order be available to shippers from the Klamath Basin and central Oregon. The assurance of access to lines other than the Southern Pacific at critical periods is a factor of prime importance to such shippers and is clearly in the public interest. Competition within reason rather than monopoly is in the public interest.' " 166 I.C.C. at 39.

service over the full length of all the lines which would connect either directly or through intervening roads with the newly constructed system.[7] The Southern Pacific and Union Pacific, anxious as in the present controversy to maintain their monopoly position, unsuccessfully opposed the creation of the new system, but, as we shall later show, their purpose has been largely accomplished by the discriminations complained of here.

When construction of the new line was completed, it created, for the first time, a route parallel to and competitive with the Southern Pacific route between Portland, Oregon, and Los Angeles, California. See the map at R. 329 and additional maps at R. 460, 466, 471, 472. This route, popularly known as either the "Bieber" route or "Inside Gateway" route, has been operated from its inception as a single unit for the purpose of competing with the parallel Southern Pacific route between the same points. Of necessity, it is made up of the end-to-end connections of Great Northern between Portland and Bieber; the Western Pacific between Bieber and the San Francisco-Oakland-Stockton area of northern California, and the Santa Fe between Stockton and Los Angeles.

For the past 33 years this route has provided the only meaningful railroad competition with Southern Pacific Company and the only choice for shippers in

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[7] "Pursuant to agreement the proposed route will provide joint freight rates between points on the applicants' lines and points on the Santa Fe and its connections, El Paso, Tex., and Albuquerque, N. Mex., and west thereof. They will also extend to Utah, Colorado, and eastern and southern states. The Great Northern would be willing to establish joint rates with other northern lines, thus making the new line a connecting link for all traffic between the northern and southern groups of transcontinental lines." 166 I.C.C. at 29.

this territory.[8] For traffic moving between California and the States of northern Oregon, Washington and western Idaho, both the Southern Pacific and Bieber routes connect with Union Pacific, Northern Pacific and Great Northern at Portland, the only common gateway served by both competing routes. During this same period the Pacific Coast region of the United States has experienced remarkable growth. For example, from 1940 to 1960, the population of the Pacific Coast region expanded by 109% compared to 36% for the United States as a whole. From 1940 to 1958, personal income in the Pacific Coast area grew by 503% compared to 355% for the United States as a whole, and over the same period, value added by manufacturing increased by 886% in the Pacific Coast region, while the comparable United States figure was 475%. Farm marketing cash receipts and retail sales also increased at rates faster than those for the entire country. R. 44-47, 456-457. This type of growth would seem to make it mandatory that the Bieber route, as one of the two railroad transportation arteries of the region, be allowed to compete on an equal basis with the Southern Pacific and its connections. As one shipper stated to the Hearing Examiner:

> * * * [W]hen the Bieber route was established * * *, the public had a reasonable right to expect that there would be a full run-out of rate via that gateway, but this has not yet happened to the

[8] The evidence showed that the Southern Pacific is Western Pacific's "principal competitor." R. 85, and see R. 220, 699. See also *Southern Pacific—Control—Western Pacific Co.*, Finance Dkt. No. 21314, January 27, 1965, slip opinion, pp. 24-25.

The Union Pacific provides some very limited competitive rail service between the Los Angeles area and the Pacific Northwest States of Washington, Oregon, and western Idaho, with its route via Salt Lake City, Utah.

extent of the joint rates that are involved in this proceeding.

It seems to me that there should be no delay in fulfilling the obligation to provide full service via the Bieber Gateway.[9]

The reason that the public's expectations have been frustrated is that Union Pacific and Northern Pacific have, except for an extremely limited number of commodities,[10] consistently refused to join the Bieber route

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[9] Statement of Clifford Worth, Supervisor of Traffic Analysis, Fibreboard Paper Corporation. R. 138, 140.

[10] Several of these exceptions are instructive, because they demonstrate that when traffic *has* passed via the Bieber route at competitive rates, it has moved without the slightest difficulty.

When U. S. Pipe & Foundry Corporation established an iron and steel pipe producing facility at Decoto, California, it discovered that it could not move its product to Union Pacific or Northern Pacific points via the Western Pacific at the same rate level as it could via the Southern Pacific. It filed a formal complaint, in 1952, charging a violation of 49 U.S.C. § 3(1), but before the case could be brought to hearing, the rates being sought were voluntarily established on a non-discriminatory basis. Over 250 cars of pipe subsequently moved over the Bieber route during the two years prior to the hearings in the instant case. R. 34, 40, 215-216, 272.

In 1960 The Campbell Soup Company, located on Western Pacific's lines at Sacramento, filed a formal request for non-discriminatory rates via the Bieber route, claiming that it had to pay an additional switching charge whenever it moved traffic to or from Union Pacific or Northern Pacific points. Southern Pacific promptly deviated from its normal policy and published tariff items calling for the absorption of the Western Pacific switching charges on Campbell Soup traffic. This mollified the shipper but still deprived Western Pacific of its own long haul. R. 628.

Western Pacific filed a § 3(4) complaint in 1959 relating only to automobiles and automobile parts, but during the pendency of the hearings the automobile plant that had precipitated the complaint was established on the lines of the Southern Pacific. Consequently, although non-discriminatory rates were published, no automobiles or parts have ever passed under them. R. 41, 200, 216-217, 272-273. Similarly, joint rates on livestock were ordered by the ICC but resulted in no movements. R. 39, 215, 273.

in through rates on the same level as those carriers participating with Southern Pacific Company, and therefore the joint rates with Southern Pacific are in virtually all instances lower than the combination rates made applicable to the Bieber route.[11] The rate situation is such that Southern Pacific is accorded joint through rates north of Portland by Union Pacific, Northern Pacific and Great Northern. Thus, joint through rates apply via Southern Pacific's single-line route *and* via its joint route with Santa Fe over northern California junctions. Great Northern applies equal rates over Portland with both Southern Pacific and Bieber routes, while Northern Pacific and Union Pacific refuse to equalize the rates with their common connections via the same point.

These discriminatory rates have continued even though witness after witness testified in this case that the refusal of appellees to grant Western Pacific the same rates accorded Southern Pacific has been harmful not only to Western Pacific but to shippers, to the public and to the entire Pacific region. Here are only a few of their many comments:

> [The members of the Canners League] want the opportunity of using both railroads * * *. [W]e want it for the purpose of car supply and service. [The Chairman of the Traffic Committee of the Canners League of California, which represents canners supplying over 90,000,000 cases of canned goods—75 per cent of all California pack, R. 148, 149.]
>
> I believe it is important that we have additional inter-railroad competition south of Portland. * * * [Inter-rail competition] serves as an incentive to excel in service matters and we believe this would

[11] R. 21-31, 214, 331 *et seq.*, 627, 652.

be beneficial to our company. * * * It would [also] increase the flexibility of rail service by affording us a wide choice of routes for such purposes as stopovers in transit and reconsignment. [The Traffic Manager of Consolidated Dairy Products Co., R. 130-131.]

Due to the present rate situation, we do not have a free choice of routing * * *. It is my firm conviction that if we had available two competitive routes * * *, we would be the recipient of improved services, and greater efficiencies from the carriers. [The Traffic Manager of Fisher Flouring Mills Co., R. 106, 107.]

Other than the nine cars mentioned, we must ignore any customer request for Western Pacific routing * * *. The routes sought * * * would give a much greater flexibility to our transit operation, and most important of all to us would be a saving of 7½ cents per cwt. on an appreciable number of cars. [The Traffic Manager of Centennial Mills, Inc., R. 111, 113.]

There is no question in my mind but that we would route a considerable number of shipments to Sutter from points on the Northern Pacific through Bieber if we had available the same rates as are applicable from origins on the Great Northern. When we have used the Bieber gateway in connection with service on the Great Northern and Western Pacific, we have found such route to be fully satisfactory. [The Traffic Manager of Trinidad Bean & Elevator Co., R. 117, 119.]

Frankly, we have found that the service * * * [on] the Bieber route is more dependable than the service of the Southern Pacific via Portland. * * * If the Northern Pacific were to join in the through rates here sought, we could use their cars, give

them a line haul, via the Bieber Gateway, and both facilitate or retain our quicker delivery schedule and not have to pay the considerable penalty which is present in today's rate schedule via such a route. [The Traffic Manager of Pacific Coast Paper Mills, a division of Puget Sound Pulp & Timber, R. 121, 122.]

We feel that we should have both routes available with the same rates. This, we believe, would eliminate delay that we now experience from having to depend upon the car supply of only one railroad * * *. It is my opinion that with the equipment resources of both railroads available, we would save many orders which we now lose because the customers demand immediate service. [The Traffic Manager of H. J. Stoll & Son, R. 127, 128.]

[W]e would then be able to draw upon the additional car supply of the Western Pacific Railroad, with the end result that we would be able to ship more of our traffic by rail to the Northwest than we are able to today during these full peak shipping seasons. * * * [I]t seems clear to us at Fibreboard that it is high time that the railroads eliminated artificial barriers against the use of their services. [The Supervisor of Traffic Analysis of Fibreboard Paper Corp., R. 138, 139, 140.]

We feel that the failure to publish joint through rates from Longview to California points via the Bieber Gateway has inconvenienced us, and our customers. [The General Traffic Manager of the Longview Fibre Co., R. 154, 155.]

I feel that it is important for us to have competitive routings available, and I believe that such a situation would considerably improve our railroad service to Northern California. [The Assistant General Traffic Manager of Boise Cascade Corp., R. 161, 162.]

The present restrictions on the final destinations of carload traffic moving from California hamper our efforts to divert this traffic to various destinations. * * * [Making the Bieber route available] would provide more expeditious routings * * *. I believe that it would open up many more markets to unsold cars moving over the Bieber route. [The Secretary and Traffic Manager of the Portland Produce Merchants Ass'n, Inc., R. 250, 251-252.]

It is our feeling that if we had competitive routes and had a choice, we would get better service not only via the Inside Gateway, but also from the Southern Pacific routes. * * * If the Commission grants the relief sought by the Western Pacific and the rates become applicable, we would certainly utilize that service. [The Traffic Manager of the Yakima Fruit Growers Ass'n, R. 152, 153.]

We feel that it would be to the advantage of our growers if we had through rates * * *. We feel that it would be more economical for us if we were able to ship directly from McHenry by rail * * *. [The Office Manager and Sales Representative of the Turlock Cooperative Growers, R. 158, 159.]

It is a well-known fact that the basic economy of Oregon is that of an agriculture and lumber economy. We feel that the greater expansion of through rates and through routes would materially assist our economy and, therefore, we strongly urge and support the complainants' position. [The Manager of the Portland Freight Traffic Ass'n, R. 165, 167.]

As the testimony amply demonstrated,[12] the discriminatory rates have prevented the Bieber route in recent years from being able to compete effectively with Southern Pacific for most traffic moving to or from points served in the Pacific Northwest by Union Pacific or Northern Pacific, although its physical facilities and services are more than adequate for the job.[13]

Western Pacific's aggressive sales efforts to participate in the available traffic have in the face of the rate situation been unavailing. A careful study of the competitive traffic available at the time of hearing showed that at least 25,000 carloads a year are artificially rendered noncompetitive and lost to Western Pacific. R. 88-90, 653. Included in that total are approximately 2,250 carloads of traffic which either originated or terminated at facilities served exclusively by Western Pacific, with the result that on such vital traffic Western Pacific could participate only to the extent of providing switching service to or from Southern Pacific. R. 95-96. Western Pacific has been unable to locate a number of important industries solely because of the current rate discrimination. Industry location, a vital

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[12] Appellees made a point of asking a few of the shipping representatives how many formal written requests for joint rates over the Bieber route they had previously submitted. The record is clear that most shippers had fruitlessly made informal requests and regarded formal applications as a useless gesture. *E.g.*, R. 103-104, 123, 131, 160, 254. Moreover, after the report and order were issued, over 100 requests from shippers were formally filed with the carrier rate bureaus for voluntary publications of the rates that Western Pacific was seeking through its complaint. The Commission, however, refused to reopen the case for the introduction of this latter evidence. See R. 512.

[13] For example, Western Pacific's freight fleet has grown from 4,951 cars in 1954 to 6,056 cars in 1960, an increase of 22%. R. 459. See also R. 47-48, 64-66, 67, and the ICC's statement at R. 632.

phase of all rail service, is strongly competitive. Southern Pacific uses the current rate situation as an effective sales tool in locating industries by advising the shipper that Southern Pacific alone can provide for a full line of rates to the Northwest. R. 81-84, 88. As the Examiner put it, the imposition of higher combination rates "precludes shippers from using the 'Inside gateway' from or to such points [in California and the Pacific Northwest]. The complainants are even deprived of traffic which they themselves originate."[14]

After careful consideration of the evidence, the Hearing Examiner held that there was discrimination, and that "There is no justification in this record for such treatment of a connecting line. The granting of a full line of rates to one railroad at an interchange point while at the same time limiting the extent of such rates to the favored line's competitor is the essence of discrimination. It is the type of unlawful discrimination that section 3(4) of the act aims to prevent." R. 654. Therefore, the Hearing Examiner concluded "that the defendants' refusal to interchange traffic at Portland, other than cast iron pipe, automobiles, livestock and class rated traffic, in the line haul of which the complainants participate via Bieber, at rates competitive with those afforded the Southern Pacific by them is an unlawful discrimination in violation of section 3(4) of the act and should be removed." R. 655. Accordingly, he recommended that the appellees be required to cease the discrimination. *Ibid.*

A division of the Commission reversed the Examiner and held that since Western Pacific neither had a direct physical connection with appellees nor already

[14] R. 652. The division of the Commission conceded this fact. R. 629.

participated in a full line of through rates with these carriers, Western Pacific had no power to challenge the discriminatory practices. R. 623-645. The division based its holding on its interpretation of the requirements for "connecting line" status which it said were set forth by this Court in *Atlantic Coast Line R.R. v. United States*, 284 U.S. 288, 293 (1932).[15] In a Petition filed with the Commission in support of Western Pacific's complaint, the United States pointed out the incongruity of this conclusion:

> [The report and order] specify, as the reason the discrimination cannot be eliminated and the monopoly broken, the very device which has made this monopoly position possible, namely defendants' long-standing refusal to accord to Western Pacific and its connecting lines the same basis and level of rates via the Portland gateway as they accord intervenor Southern Pacific.[16]

Despite this logic, the Commission refused to reverse the division, and Western Pacific filed suit before the three-judge United States District Court for the Northern District of California.

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[15] *Ibid.* The division also held that the Bieber and Southern Pacific routes are not sufficiently similar. R. 643. We believe we demonstrated beyond question to the District Court that the division's conclusions on this score were wholly fallacious. In any event, the District Court never reached the question of similarity, deciding the case wholly on the issue of "connecting line" status. We demonstrate later in our brief not only that the District Court erroneously decided the connecting lines issue but that a remand for further consideration of the issue involving similarity of conditions is unnecessary, since the record fully supports our position in this regard.

[16] "Petition of United States for Leave to Intervene for the Purpose of Petitioning the Full Commission for Reconsideration of the Report and Order of Division 2 and to be Heard on Oral Argument". R. 550, 551.

The District Court found as a matter of law that Western Pacific was not a "connecting line" within § 3(4) of the Act, which prohibits rate discrimination between connecting lines. It based this conclusion, first, on the following two sentences from the *Atlantic Coast Line* decision: "There is no warrant for limiting the meaning of 'connecting lines' to those having a direct physical connection with the Clinchfield. The term is commonly used as referring to all the lines making up a through route." 284 U.S. at 293; R. 733. Then, ignoring the way in which "through route" was used in *Atlantic Coast Line,* the District Court turned instead for a definition of the term to a case involving not § 3(4) but § 15, *Thompson* v. *United States,* 343 U.S. 549 (1952). R. 733. There, this Court said: "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service." 343 U.S. at 557. By putting together these sentences from the *Atlantic Coast Line* and *Thompson* cases, the District Court concluded that Western Pacific was not a connecting line because it connected with the appellees at Portland only by means of an intermediate carrier (the Great Northern), and because the appellees had refused to hold themselves out as offering through service in connection with the Bieber route. R. 733-734. But the District Court concluded significantly that "Because the Supreme Court has not rendered any decision on this question since *Atlantic Coast Line,* this Court is bound to follow that decision. Any further liberalization of the present definition will have to come from the Supreme Court." R. 734.

SUMMARY OF ARGUMENT

A complaining railroad need not have a direct physical connection at the common interchange point in order to enjoy "connecting line" status under the anti-discrimination provisions of § 3(4) of the Interstate Commerce Act. Nor is it necessary that the discriminating carriers previously have held themselves out as offering through service over the complaining line. Where a route is physically available for competitive service—and particularly where, as here, the route is constructed and operated for the purpose of providing a competing route—carriers cannot discriminate against it when reasonably similar conditions and circumstances prevail.

This position is dictated not only by the facts of competitive life in this case (the Southern Pacific is ten times the size of the competing Western Pacific) but also by the legislative history of the Act and by this Court's decisions. Nothing in the Act's history even suggests the definition of "connecting lines" imposed by the opinion below. On the contrary, Congress apparently intended to describe a continuous series of lines where the traffic on one could physically move onto the tracks of the others. And beyond all doubt Congress intended to outlaw rate discrimination in all its forms and in all its manifestations.

The principal case relied on by the District Court, *Atlantic Coast Line R. R.* v. *United States*, 284 U.S. 288 (1932), instead supports our position. The complaining railroad in that case had no physical connection with the discriminating carrier, and there was no holding out of through service, since construction of the route had not even been completed at the time of the discriminating schedules. Yet this Court held the dis-

crimination illegal, and the ICC subsequently held it illegal under § 3(4).

The term "through route" does not appear in § 3(4). Cases interpreting that term as it is used in other sections of the Act are not applicable here. If the term has any relevance at all in a § 3(4) case, it is a loose concept connoting physically available service. This is established not only by *Atlantic Coast Line* but by the successive *American Barge Line* decisions; by *Chicago, I. & L. R. R.* v. *United States,* 270 U.S. 287 (1926) (where no physical connection and no joint services were present), and by other cases dealt with in detail.

If the District Court's views were to prevail, a carrier could discriminate by granting joint rates to one competitor and none at all to the other, even though it would be violating § 3(4) by granting slightly lower joint rates to one carrier than to the other. The discrimination cannot thus be used to exculpate itself. This is particularly true in the light of the substantial injuries to Western Pacific caused by the discrimination (a loss of substantial traffic that it originates itself, and a potential loss of 25,000 carloads a year that would be available but for the discrimination), as well as the proven injuries to shippers, to the public, and to an explosively-growing section of the country.

If the Court agrees that Western Pacific is a connecting line, there need be no remand, for the record establishes beyond doubt that there are present between the two competing routes similar circumstances and conditions that require equal treatment.

ARGUMENT

I. WESTERN PACIFIC IS A CONNECTING LINE

The District Court held that Western Pacific had no standing to bring suit because it is not a "connecting line" within the meaning of § 3(4) of the Interstate Commerce Act. The court did not in any way question the fact that Western Pacific forms the middle link in the Bieber route, that the Bieber route connects with the appellees at Portland, and that the Bieber route competes on north-south traffic with the Southern Pacific route, which also connects with the appellees at Portland. The court also did not dispute the fact that the appellees have granted the Southern Pacific joint rates which are substantially lower than the combination rates accorded the Western Pacific, so that in effect the Bieber route is commercially closed to interchange traffic. The sole basis of the court's decision was that Western Pacific does not itself connect physically with the appellees at the interchange, and that the appellees have not previously held themselves out as offering through service over the Bieber route.

We submit that this is not the test of "connecting line" status. Our position is that carriers cannot grant discriminatory rates to one route and not to another route which is physically available for competitive service, particularly when similar circumstances and conditions prevail. This is all the more true where, as here, the competing route was constructed and has been operated for the very purpose of providing an alternative to the favored route. As shown by our Statement,

supra, there can be no question about the competitive nature of the Bieber route, because it was constructed specifically to compete with the Southern Pacific route, and the single factor keeping it commercially closed is the discrimination in rates enforced by the appellees.

It must be made clear at the outset that the Western Pacific, by the very nature of its size, must compete without the intervention of artificial barriers. As the ICC has recently found,[17] Western Pacific in 1961 had 1,927 miles of rail and ferry operations and total assets of less than $181 *million.* In that same year, the Southern Pacific by most standards was the third largest railroad in the United States, with 22,604 miles of track and total assets of $2.4 *billion.* In other words, Southern Pacific in most respects is more than ten times larger than Western Pacific.

Nevertheless, Western Pacific seeks no advantages or concessions. It seeks only the right to compete. That requires an end to the present discriminatory rate practices by Union Pacific and Northern Pacific. No physical additions or changes in structures or services are necessary. Equalization of the rates published with the two common route connections at Portland would impose no greater service obligation upon either Union Pacific or Northern Pacific than they presently undertake in conjunction with Southern Pacific traffic. The only change would be one of doing away with rate discriminations.

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[17] *Southern Pacific—Control—Western Pacific Co., supra* n. 8, slip opinion, p. 8, App. A, pp. 2-4.

Northern Pacific and Union Pacific have, for years, dictated which carrier south of them will be entitled to offer their respective services to shippers. Our position is that the only legitimate decision as to which route will handle the traffic south of Portland should be that of the shipper exercising a free choice, on an equal rate basis, between presently-available services.

As discussed more fully below, we think the issues in this case have already been decided favorably to Western Pacific by the Court's decisions in such cases as *American Barge Line,*[18] *Chicago, I. & L. R. R.,*[19] and, properly construed, *Atlantic Coast Line.*[20] However, it is also important to point out how the term "connecting lines" developed within the context of § 3(4), because the legislative history, as well as this Court's opinions, fully support our position.

The present reference to "connecting lines" in § 3(4) is based on § 3 (par. 2) of the 1887 Act, which provided that carriers must afford equal facilities for the delivery of passengers and property "to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines." 24 Stat. 380. But even prior to the passage of the Interstate Commerce Act, Con-

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[18] *American Barge Line Co.* v. *Alabama G. S. R. R.,* 296 I.C.C. 247 (1955), *aff'd,* 303 I.C.C. 463 (1958), *modified,* 306 I.C.C. 167 (1959), *rev'd sub nom. Arrow Transp. Co.* v. *United States,* 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd sub nom. State Corp. Comm'n of Kansas* v. *Arrow Transp. Co.,* 361 U.S. 353 (1960).

[19] *Chicago I. & L. R.R.* v. *United States,* 270 U.S. 287 (1926).

[20] *Atlantic Coast Line R. R.* v. *United States,* 284 U.S. 288 (1932).

gress had made use of the "connecting lines" concept. In 1866, Congress passed "An Act to Facilitate Commercial, Postal, and Military Communication among the Several States." 14 Stat. 66. This Act provided that "every railroad company in the United States * * * is hereby *authorized* to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, * * * and to *connect with* roads of other States, so as to form *continuous lines* for the transportation * * * to the place of destination" (emphasis added). The purpose of this Act and a companion Act, entitled "An Act to Authorize the Construction of Certain Bridges and to Establish Them as Post-roads" (14 Stat. 244), was analyzed as follows:

> It is claimed that the objects of these acts are to secure to travel and freight going from State to State, through lines of transportation without change of cars. * * * We fail, however, to find in these acts any provisions requiring railroads to connect so as to form such continuous lines, or requiring the cars of one to be hauled over the roads of another. * * * They simply *authorize* the railroad corporations so to conduct their business, and thereby exempt such a course from local interference or prohibition, on the part of State or municipal legislation. *They do not command connection by railroads; they simply permit it.* [*Richmond* v. *Dubuque & S.C.R.R.*, 33 Iowa 422, 499 (1872), *aff'd*, 86 U.S. 584 (1873) (emphasis added).]

Subsequent to the passage of these 1866 Acts and the decisions interpreting them, Congress came to realize that mere "authorization" was not enough to secure the untrammeled flow of people and property along con-

necting railroad lines. The result was the creation in the 1887 Act of a "requirement" rather than an "authorization." Except for the addition of the word "fares," the relevant language remained the same in the 1920 amendment. 41 Stat. 479. The latest amendment in 1940 provided that carriers must afford equal facilities for the delivery of passengers and property "to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper." 54 Stat. 903-904, 49 U.S.C. § 3(4).

It must be emphasized that nothing provided in the Act or stated in Congress supports even by implication the interpretation of "connecting lines" imposed upon appellants in this case by the ICC and the District Court. What the legislative history does make clear, however, is that "every variety of unjust discrimination" was to be prohibited. For example, the Senate Report on the original bill stated:

> The provisions of the * * * [Interstate Commerce Act] are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful and adding to the remedies now available for securing redress and enforcing punishment. * * * [S. Rep. No. 46, 49th Cong., 1st Sess., 215-216 (1886).[21]]

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[21] This language was cited and relied upon by the Court in *A. L. Mechling Barge Lines, Inc.* v. *United States*, 376 U.S. 375, 384 (1964).

And Senator Cullom, introducing the bill, stated:

> The third section is broader and more general in its terms [than the second section, outlawing the long-short haul differential] and * * * contains a general prohibition of every variety of unjust discrimination. * * * The second part of the section is modeled in part upon the English and in part upon similar statutes in several of the States. Its purpose is to require railroads to furnish to connecting roads all reasonable and proper facilities for the interchange of traffic that may be necessary for the convenience of the public, and to prevent one road, or a combination of roads, from 'freezing out' a connecting line by refusing to accept traffic from it or deliver traffic to it upon any terms, as has been done. [17 Cong. Rec. 3472 (1886).]

The English statute to which Senator Cullom no doubt referred was The Railway and Canal Traffic Act of 1854, 17 & 18 Vict. c. 31, sec. 2:

> Every railway company * * * shall, according to [its] respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways * * * belonging to or worked by such companies respectively * * *; and no such company shall make or give any undue or unreasonable preference or advantage to * * * any particular person or company, or any particular description of traffic * * *, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage * * *; and *every railway company * * * having or working* [*sic*] *railways * * * which form part of a continuous line of railway communication* * * * shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways * * *

> without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered [*sic*] to the public desirous of using such railways * * * as a continuous line of communication. * * * [Emphasis added.]

In construing the meaning of "continuous line of railway communication," the Railway and Canal Commission dealt with a case in which the X railway owned two separate lines of track connected by lines of the Y and Z railways. At the junction of the X and the Y railways, there was a physical union of the tracks, but routing across the junction had not been sanctioned by the Board of Trade. Shippers and the X railway were anxious to take advantage of the route over the two intervening lines, but the management of the intervening lines balked at the suggestion. The Commission ruled that the route did not at that time constitute a "continuous line of railway communication" because of the failure to obtain the Board of Trade's sanction, but it added significantly:

> * * * [T]he public desirous of using the railways as a continuous line of communication are not to be prejudiced by any disputes as to the rights of the companies *inter se*; and if the application [to the Board of Trade] had * * * been properly framed we should have had no difficulty in making an order against the companies, which would have had the effect of immediately opening this junction for the purpose of the traffic in question. [*Hammans, Foster* v. *Great Western Ry.*, 4 Ry. & Can. Tr. Cas. 181, 185 (1883).]

In another case, the G railway had to run over part of the M railway's line to reach the L railway at the town of A. The Commission, construing the "continu-

ous line of railway communication" provision of The Railway and Canal Traffic Act, as well as other statutes, ruled that the lack of a direct physical connection between the G railway and the L railway at A did not preclude the G railway from taking advantage of its right to apply for sidings and other facilities at A in order to switch trains at the A junction. *Great Central Ry.* v. *Lancashire & Y. Ry.*, 13 Ry. & Can. Tr. Cas. 266, 274 (1908), *aff'd*, 14 Ry. & Can. Tr. Cas. 131 (C.A. 1910).

Neither in the legislative history of The Railway and Canal Traffic Act nor in its subsequent construction by the Railway and Canal Commission or by the English Courts is there any intimation that only railroads which have a direct physical connection with each other, rather than through an intervening line, may take advantage of the rights conferred by the Act. This absence of a requirement of a direct physical connection is also true of the American state statutes to which Senator Cullom referred. Instead, examination of state statutes and cases construing them lends force to the proposition that the phrase "connecting lines" or "continuous line of railway communication" was used to characterize a situation in which it was physically possible for the rolling stock of railroad A to proceed onto railroad B, then onto railroad C, and so on.

Early state legislatures were concerned because different railroad companies were using different gauges of track, failing to install switching facilities, etc. Tennessee, for example, passed a law requiring the gauge of all the railroads in the state, except those connecting with railroads of other states, to be five feet. At the same time, it passed a statute against rate dis-

crimination somewhat analogous to the provisions of § 3(4) of the Interstate Commerce Act:

> Every railroad company, when required, shall receive on its road and branches the full loaded freight cars of all other companies, transport them to their destination, and return them, without charging for the transportation of the goods, wares, and merchandise, or produce therein, a greater rate of freight than they charge for similar transportation in their own cars. [Act of 1852, Tenn. Code §§ 1118, 1120, construed in *Louisville & N.R.R.* v. *State,* 68 Tenn. 522, 524 (1876).]

In Pennsylvania, not even a diversity of gauge prevented connecting-line status for two railroads physically separated by a third: "* * * we decide that the Catawissa and the Atlantic and Great Western are railroads connected by an intervening road, notwithstanding the diversity of gauge prevents the running of common cars." *Philadelphia & E.R.R.* v. *Catawissa R.R.,* 53 Pa. 20, 61 (1866). Thus, the concept was clearly established that "Railroads can be connected, either directly or by intervening roads." *Black* v. *Delaware & Raritan Canal Co.,* 22 N.J. Eq. 130, 402-403 (1871), *rev'd on other grounds,* 24 N.J. Eq. 455 (1873).[22] See also *Atchison, T. & S. F. R. R.* v. *Fletcher,* 35 Kan. 236, 10 Pac. 596 (1886); *Mayor and City Council of Baltimore* v. *Baltimore & O.R.R.,* 21 Md. 50, 89, 91-92 (1864); *Fitchburg R.R.* v. *Grand Junction R.R. & Depot Co.,* 86 Mass. (4 Allen) 198, 205-206 (1862); *Baltimore & O.R.R.* v. *Wheeling,* 54 Va. (13 Gratt.) 40, 69-70 (1855). In other words, "connecting" did not necessarily mean a direct physical connection.

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[22] As pointed out below, this case was relied on by the ICC in the *Atlantic Coast Line* case to show that lines need not be physically connected in order to be "connecting lines."

Despite this legislative history, the ICC and the District Court in the instant case concluded that in order for there to be "connecting line" status, either there must be a direct physical connection at the common interchange, or all of the participating carriers must hold themselves out over a period of time as offering through transportation service. This conclusion was reached because of what we believe was a faulty interpretation of this Court's opinion in *Atlantic Coast Line R.R.* v. *United States,* 284 U.S. 288 (1932).

The true nature of the *Atlantic Coast Line* case can only be gleaned from a review of the briefs in this Court and the opinions not only of this Court but of the ICC and the District Court.

The origins of the case go back to 1923, when the Atlantic Coast Line Railroad (Atlantic) and the Louisville & Nashville Railroad (L & N) sought to lease the Carolina, Clinchfield & Ohio Railway (Clinchfield). At that time, Clinchfield connected with the Chesapeake & Ohio (C & O) at Elkhorn City, Kentucky, and ran in a southerly direction to Spartanburg, South Carolina. There it connected both with the Piedmont & Northern (Piedmont), which ran to Greenwood, South Carolina, and with the Charleston & Western (Charleston), which was owned by Atlantic and which ran from Spartanburg *through* Greenwood to Augusta, Georgia. At Augusta, Charleston connected with the Georgia & Florida (G & F), which ran southward. Thus, in 1923 the only through route in operation between northern points on the C & O and southern points was via the Clinchfield, the Charleston, and G & F. Since there was no G & F connection between Greenwood and Augusta, the only competing stretch of line

was a short one by way of the Piedmont from Spartanburg to Greenwood.

The ICC allowed the Atlantic and the L & N to lease the Clinchfield on certain conditions, two of which are relevant here. Condition 3 required the parties to continue *existing* routes and gateways for the interchange of traffic and "the present neutrality of handling the traffic inbound and outbound" so as to permit equal opportunity for service and routing or movement of competitive traffic "to and from *all connecting lines reached by the line*" of the Clinchfield, without discrimination (emphasis added).[23] Condition 4 required the parties to permit carriers *"now connecting, or which may hereafter connect,"* with the Clinchfield to participate without discrimination in through routes and joint rates between points at and beyond the Ohio River on the one hand, and points in southeastern and Carolina territory on the other, so that the Clinchfield could be maintained "as an open route equally available to all carriers *connecting with* the Clinchfield for traffic between the points designated" (em-

[23] Condition 3 read in full:

"So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, without discrimination in service against such competitive traffic." 90 I.C.C. 113, 133 (1924).

phasis added).[24] The parties agreed to the conditions, and the lease went into effect in 1924. See 90 I.C.C. 113 (1924).

Two years later, in 1926, the ICC authorized the construction by G & F of an extension of its line (known as the Greenwood extension) from Augusta to Greenwood. 117 I.C.C. 473 (1926). *This extension was not actually completed and opened until 1929, three years later.* In the meantime, tariffs had already been filed for joint rates south to and through Augusta over the Clinchfield and the Charleston. The lessees of the Clinchfield did not want these rates to become applicable over the newly-constructed Greenwood extension of the G & F. Therefore, just prior to the opening of the Greenwood extension, the lessees filed schedules

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[24] Condition 4 read in full:

"The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in the southeastern and Carolina territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, and shall not discriminate as to rates, fares, and charges against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated." 90 I.C.C. at 134-135.

designed to restrict to their own lines the already-filed joint rates, thus preserving their own long haul.[25]

Before the schedules went into effect, the G & F and the Piedmont protested to the ICC, claiming that the schedules violated the conditions already established in the lease case. The ICC agreed and cancelled the schedules. These lease conditions, said the ICC, were intended "to preserve the relationships then existing between the Clinchfield, on the one hand, and the public and connecting lines of railroad, on the other hand, which were the relationships *usually and normally existing* between independent railroads and those whom it serves." 165 I.C.C. 3, 15 (1930) (emphasis added). It explained: "While our immediate concern [in the lease case] was to prevent the closing of any gateways and routes then existing, there was no thought of excluding such changes or additions as would further the general purpose." *Ibid.* And to the argument that the G & F had not even connected with the Clinchfield at the time of the lease, the ICC replied: "There is no warrant for limiting the meaning of 'connecting lines' to the direct connections of the Clinchfield. The term is commonly used in referring to the lines in general making up a through route. * * * The test to be applied is that of the proper relationships between the Clinchfield, as an independent line [because the lease conditions had required that it be kept independent], and its connections to and from southeastern territory." *Id.* at 15-16.

Parenthetically, it should be noted here that the ICC by the use of this language could not have meant by a "through route" what the ICC and the District

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[25] Transcript of Record, *Atlantic Coast Line R.R.* v. *United States*, No. 88, October Term 1931, pp. 14, 15.

Court have taken "through route" to mean in the instant case. That is, they could not have meant a holding out by all carriers of a "through route" *through* the point of interchange. The "through route" in the *Atlantic Coast Line* case, in fact, had never even gone into effect. Before the ICC decision was rendered and while the new route was still under construction, the lessee carriers had taken affirmative steps to make certain that joint rates already in effect would never apply over the new route, once completed.

Following the ICC decision, the lessees of the Clinchfield sued in court for an injunction. The court dismissed the bill, quoting large portions of the ICC's opinion with approval. *Atlantic Coast Line R. R.* v. *United States,* 48 F. 2d 239 (W.D.S.C. 1931). Significantly, the court emphasized that the net effect of the lease conditions had been to continue the Clinchfield "as a neutral route," so that "roads handling through traffic passing over it were to be treated just as though the lease were not in existence and the [Clinchfield] were an entirely independent road independently operated." *Id.* at 243. The conditions, said the court, enabled the Clinchfield, Atlantic and L & N "to serve the purposes which they put forward as reasons for the acquisition and at the same time to preserve the independent status of the [Clinchfield] for the benefit of the public and the protection of connecting carriers." *Id.* at 244-245. The court simply assumed that the lines involved were in fact "connecting" carriers.

That was the status of the case when the lessees appealed to this Court. In their brief, the lessees argued that the lease conditions, properly construed, did not require the lessees' lines to be short-hauled "over future routes over a line of railroad not then in exist-

ence and not now connecting with or reached by the lines of the Clinchfield."[26] The lessees went on to contend that the ICC by its decision had flouted §§ 15(3) and (4) of the Act (Brief for Appellants, *supra,* at pp. 27, 35, 41-43, 46-48), pointing out that the schedules filed by the lessees prevented the opening of future routes rather than closed existing routes. *Id.* at 48. It was clear from the wording of the conditions (and from modifications affected in them), argued the lessees, that the ICC was thinking only of existing routes then connecting with the Clinchfield, and not future routes which would not even connect directly with its lines. *Id.* at pp. 23-25. The Greenwood extension *"did not then and does not now connect with the line of the Clinchfield." Id.* at 26; emphasis added. And while the words "connecting lines," standing alone, might possibly include lines by an intermediate carrier, the words "connecting lines *reached by* the line of the Clinchfield" clearly could only mean lines with a direct physical connection. *Id.* at 30; emphasis added. To illustrate the point, the lessees pointed out that "it is entirely possible to get a car containing traffic from the track of the Clinchfield at Spartanburg to the track of the Georgia and Florida at Greenwood, and yet no one can truthfully say that the Georgia and Florida, which terminates at Greenwood, connects with the line of the Clinchfield, which begins at Spartanburg, or that the rails of the Georgia and Florida are 'reached by the line of the Clinchfield Companies.'" *Id.* at 31.

We emphasize this argument by the lessees because it is analogous to the one made by the appellees in the

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[26] Brief for Appellants, *Atlantic Coast Line R. R.* v. *United States,* No. 88, October Term 1931, p. 11.

instant case, and yet this Court rejected it in its *Atlantic Coast Line* decision.

Opposing the lessees, the United States and the ICC in their *Atlantic Coast Line* brief argued that "connecting lines" did not mean a direct physical connection. They pointed out, for example, that in *Black* v. *Delaware & Raritan Canal Co., supra,* 22 N.J. Eq. 130, 398, 402, two railroads were held to be "connected" even though they were joined together only by means of intervening roads.[27] The United States and the ICC then made this alternative argument:

> We also submit that through traffic over the Greenwood extension is within the protection of the conditions attached to the Clinchfield lease even if the protection there given is limited to lines physically connecting with the Clinchfield. The Piedmont, by reason of its connection with the Clinchfield on the north and with the Georgia & Florida on the south, is part of a through route between points at and north of the Ohio River and points in the Southeast. The restrictive schedules filed by appellants closing the Greenwood extension to joint rates on through traffic between these points prevent the Piedmont from participating in this through traffic via its connection with the Georgia & Florida at Greenwood. Appellants can not close the Piedmont line to this through traffic by restrictions preventing it from interchanging traffic with the Georgia & Florida on the basis of joint rates. The conditions of the Clinchfield lease require that road to be maintained 'as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated.' (R. 92.) It is not so equally available if the Atlantic

[27] Brief for the United States and the Interstate Commerce Commission, *Atlantic Coast Line R.R.* v. *United States,* No. 88, October Term 1931, pp. 16-18.

> Coast Line system can reach the Southeast on joint rates but the Piedmont can not reach the same region, via the Georgia & Florida, on the same joint rates. [Brief for the United States and the ICC, *supra,* at pp. 18-19.]

Note that this argument treated as a "through route" a combination of lines (the Clinchfield, Piedmont and G & F) that had never actually been open to traffic, since the Greenwood extension of the G &F connecting with the Piedmont had not even been completed. Note also the assumption that since one set of lines (those of the Clinchfield and its lessees) could link the north and the south by the use of joint rates, it was a violation of the lease conditions (which admittedly closely paralleled what was then § 3(3) of the Act) to refuse these same joint rates to a competitive system made up of a series of connecting carriers.

This Court rejected the arguments of the lessees and affirmed the lower court's approval of the ICC order. In so doing, it dealt in only two sentences with the theory that "connecting" required a physical connection: "There is no warrant for limiting the meaning of 'connecting lines' to those having a direct physical connection with the Clinchfield. The term is commonly used as referring to all the lines making up a through route." 284 U.S. at 293. In a footnote, the Court supported this statement with a reference to the Carmack Amendment (24 Stat. 386, as amended, 54 Stat. 919, 49 U.S.C. § 20(11)), and the cases of *Galveston, H. & S. A. R. R.* v. *Wallace,* 223 U.S. 481, 489 (1912), and *Galveston, H. & S. A. R. R.* v. *Woodbury,* 254 U.S. 357, 358 (1920). This was a revealing footnote, because the Carmack Amendment employs a particularly loose concept of "connecting lines," as shown by the

two cases cited by the Court and others as well.[28] Moreover, through routes and joint rates are not necessary under the Carmack Amendment.[29]

The District Court in the instant case took this Court's reference to "through route" in *Atlantic Coast Line* to mean the same kind of "through route" defined in the later case of *Thompson* v. *United States*, 343 U.S. 549, 557 (1952). But this ignores the fact that *Thompson* was dealing with an entirely different problem—the establishment of through routes under §§ 1 and 15 of the Act. It also ignores the fact that even the *Thompson*-type "through route" was *not* present in *Atlantic Coast Line*. In *Atlantic Coast Line*, there was a "through route" only in the technical and unrealistic sense that tariffs were in effect which, *if* they had been continued after the completion of the new extension, would have been applicable over the complainants' lines. The important point is that the discriminating carriers (the lessees) had never purposefully held themselves out as offering through transportation service over the complainants' lines. On the contrary, at their earliest opportunity they had taken the only affirmative steps open to them (the filing of schedules to restrict the tariffs to their own lines) for the very purpose of *preventing* an offer of through service over any lines but their own.

Thus, this Court in *Atlantic Coast Line* did not mean—indeed, it could not have meant—that a "con-

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[28] *E.g.*, *Missouri, K. & T. R.R.* v. *Ward*, 244 U.S. 383, 387-388 (1917); *Minneapolis, S. P. & S. S. M. R.R.* v. *Metal-Matic, Inc.*, 323 F.2d 903 (8th Cir. 1963).

[29] *Baer Bros. Mercantile Co.* v. *Denver & R. G. R.R.*, 233 U.S. 479, 491 (1914); *United States* v. *Mississippi Valley Barge Line Co.*, 285 F.2d 381, 391-393 (8th Cir. 1960).

necting line" must either have a direct physical connection or be part of a through route in the sense that, as phrased in *Thompson,* "the participating carriers hold themselves out as offering through transportation service." If that had been the test in *Atlantic Coast Line,* it never would have been met, and that very case would have been decided differently. Instead, it seems clear from the facts and arguments in the case that what this Court meant by "through route" was simply a series of connecting carriers *available* for through transportation service—that is, a series of connecting lines which "usually and normally" would be expected to furnish through transportation service and which in fact would furnish such service if it were not for the discriminatory rates imposed upon them.

A further fact to be noted about *Atlantic Coast Line* is that even if the Court had meant its definition of "connecting lines" to be a restrictive or limiting one—which we dispute—the opinion certainly did not indicate that the "through route" had to encompass the discriminating carrier. Rather, the more logical interpretation is that the G & F and the Piedmont formed a "through route" connecting with the Clinchfield, and the G & F and Piedmont are comparable to the Western Pacific and the Great Northern in the instant case. See R. 700, 702.

Any thought that the *Atlantic Coast Line* ruling was solely one of interpreting a lease, without relation to discrimination under the Act, was dissipated by the subsequent ruling of the ICC in the same case. After this Court's decision, the same complainants and others sought in a new ICC proceeding to make applicable to themselves the joint rates already in effect over various routes, including between Greenwood and Augusta. Thus, some of the *same* parties, and the *same* inter-

change point, were involved as had been before. The ICC held not only that the lease conditions had been violated but that "the failure and refusal of defendants to permit complainants to participate between Augusta and Greenwood or Spartanburg in joint rates on traffic moving between southeastern territory, on the one hand, and Groups A, B, and C, on the other hand, while maintaining joint rates on like traffic in connection with the Charleston between Augusta and Spartanburg is a discrimination in rates and charges between connecting lines in violation of section 3(3) [now § 3(4)] of the act * * *." 191 I.C.C. 489, 500 (1933). This finding was made despite the lessees' arguments that the routes sought were "circuitous and uneconomical" and that "no representatives of shippers" had appeared to champion the relief sought. *Id.* at 495.

Thus, properly interpreted, the *Atlantic Coast Line* decision stands for the proposition that the very type of discrimination practiced in the instant case is a violation of § 3(4) of the Act. If, for some reason not apparent to us, *Atlantic Coast Line* is to be interpreted in any other way, it should be overruled.

We wish to make clear that in no way are we attacking here the basic definition of a "through route" as that term is used in the Act itself and as it has been defined by this Court in such cases as *Thompson* v. *United States, supra,* 343 U.S. 549, and *St. Louis Southwestern Ry.* v. *United States,* 245 U.S. 136, 139 (1917). But it must be remembered that the term appears only in certain specific sections of the Act—namely, 49 U.S.C. §§ 1(4), 5b(4), 6(1), and 15(3), (4), (8)—and it does *not* appear in § 3. The ICC and the District Court in this case not only treat the term as if it were a part of

§ 3, but assume further that the term was referred to in *Atlantic Coast Line* in some mechanical, ritualistic sense. We have shown that *Atlantic Coast Line* cannot be interpreted in that fashion.

The reason "through route" has been defined as it has in the past is because of the particular nature of the problem with which the Court has been faced when construing it. Virtually all of the through-route cases have involved a construction of §§ 1 or 15 of the Act. The outstanding example, of course, is the case relied on by the District Court, *Thompson* v. *United States, supra.*

In that case, the complainant asked the ICC to prescribe reasonable rates on grain from points in Kansas on the Missouri Pacific to an interchange at Concordia with the Burlington, and from Concordia to Omaha by way of the Burlington. Since it was the position of the complainant that a "through route" already existed from Kansas points all the way to Omaha by way of the Missouri Pacific and Burlington, it requested reasonable rates under § 1(4) of the Act, which provides that carriers shall establish reasonable through routes with other carriers "and just and reasonable rates, fares, charges, and classifications applicable thereto * * *." Both the ICC and the District Court found that a through route already existed, and that therefore the ICC could prescribe reasonable rates over it. But the record showed, and the ICC confessed in its argument before the District Court,[30] that *no* grain had ever passed all the way from the Kansas points to Omaha, and there was no evidence that through trans-

[30] Transcript of Record, *Thompson* v. *United States,* No. 513, October Term 1951, p. 224. See also the Memorandum for the United States in the same case, p. 10.

portation service had ever been offered. Since § 1(4), like §§ 15(3) and (4), requires an arrangement between the parties (even if implied) before the Commission can prescribe joint rates, this Court rightly held that no such arrangement had ever been formed. There being no through route, the ICC should have made the necessary findings under §§ 15(3) and (4) before establishing reasonable rates.

It is clear from all of these cases that if "through route" has any application at all in a § 3 case, the term carries no formalistic meaning (as it must, for example, in a § 15 case). Rather, it is a loose concept connoting physically available service.[31] And in testing discrimination, the courts look not so much to the intent of the carriers as to the practical effects of the rate structure.[32]

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[31] An example of the type of meaning often accorded the term appears in *The Virginian R.R.* v. *United States*, 272 U.S. 658 (1926). There, after stating that the Virginian had "never held itself out as equipped to carry coal to the West, or joined in joint rates to western markets" (*id.* at 664), the Court nevertheless concluded that § 15 was not involved because "Through routes to the West were already in existence. And there are through rates by combination. * * * *The fact that the combination rates were excessive constituted the only obstacle to the movement.*" *Id.* at 666; emphasis added. In other words, as in the instant case, routes were physically available, combination rates were in effect, but the discriminatory nature of the combination rates when compared with competing joint rates prevented the lines from being "commercially" open.

[32] Intent has often been ignored altogether. In *Matter of Through Routes and Through Rates*, 12 I.C.C. 163, 168 (1907), for example, the ICC said: "Here, then, it is shown that through routes to certain points may be indicated by the presence of through routes to other points on the same line, although the carrier may not have intended such result." The ICC has repeatedly looked to the practical facts of competition rather than to mechanical rules. *L. T. Barringer & Co.* v. *United States*, 319 U.S. 1, 7, 8 (1943).

The precise position of the ICC in the instant case, including its reliance on *Thompson,* was advanced and rejected in *American Barge Line Co.* v. *Alabama G. S. R. R.,* 296 I.C.C. 247 (1955), *aff'd,* 303 I.C.C. 463 (1958), *modified,* 306 I.C.C. 167 (1959), *rev'd sub nom. Arrow Transp. Co.* v. *United States,* 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd sub nom. State Corp. Com'n of Kansas* v. *Arrow Transp. Co.,* 361 U.S. 353 (1960).

In that case, grain in some cases was sent by rail to Ohio River transit points and later shipped, again by rail, to specified interior points. This grain, called "ex-rail" traffic, carried proportional rates. The complaining barge lines claimed that they could not ship grain by barge to the same Ohio River ports, because if the grain were thereafter sent by rail to the specified points, it would carry local rail rates which were substantially higher than the proportional ex-rail rates. In other words, they argued, it was a discrimination in violation of § 3(4) for the ex-rail rates to be lower than the ex-barge rates.

The ICC, citing *Atlantic Coast Line R. R.* v. *United States, supra,* and *Thompson* v. *United States, supra,* concluded that § 3(4) applies only to "connecting lines," and that "In order for lines to be regarded as connecting, participation in through routes and through transportation is necessary." 296 I.C.C. at 251-253. The barge lines were not connecting because they "will not accept a shipment for through movement," nor "do the barge lines intend to publish through rates." *Id.* at 251. In fact, "there is no movement and no prospect of movement," and "there are no transfer facilities and no prospect of any * * *." *Id.* at 251-252. The barge traffic left the possession of the barge companies at the port and came into full possession of the owner

of the property. In some cases there were not even elevators available to transfer the grain from barge to rail car. *Id.* at 251. "As the complaining barge lines and defendants [railroads] do not form through routes, or handle through traffic via the Ohio River crossings, they cannot be regarded as 'connecting' within the terms of section 3(4)." *Id.* at 253; see also *id.* at 254, 255.[33]

Subsequent to that decision, *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56 (1956), was decided, and the ICC then reopened the *American Barge Lines* case and wrote a new opinion. 303 I.C.C. 463. In that opinion, although the facts were precisely the same as they had been before, the ICC ruled:

> In the prior report, we stated that in order for lines to be regarded as connecting, present participation in through routes and through transportation is necessary. We are now of the view that while present participation in such routes and transportation is not necessary, there must be a willingness to participate in through routes and through transportation before a carrier subject to either part I or part III of the Act may be regarded as a connecting carrier under section 3(4). [*Id.* at 468.]

The Court will note that this language was *not* restricted to water carriers; on the contrary, by referring to part I as well as to part III of the Act, the

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[33] The decision also dealt with § 3(4) charges involving Mississippi and Missouri River ports and reached similar conclusions (*id.* at 257-258), and with §§ 1 and 3(1) charges involving Tennessee River ports. *Id.* at 258-267. For purposes of simplicity, we treat here only those parts of the various decisions dealing with § 3(4) charges involving Ohio River ports.

ICC was giving its new conclusion the broadest possible application.

The ICC went on to hold, however, that the complaining barge companies still could not be regarded as "connecting carriers" because there were no "physical transportation facilities to form the connection 'between connecting lines,' and [no] use or operation of such facilities by the lines concerned in performing the service of interchange between them." *Id.* at 469. In other words, since in many cases it was physically impossible to transfer the grain from barge to railroad car, and since the barge lines were not prepared to construct such facilities, the barge lines were not "connecting."

> It seems clear that carriers which are unwilling to share the obligations commonly involved in arrangements for the interchange of traffic for continued movement are not in a position to urge successfully that they are the victims of discrimination under section 3(4). [*Id.* at 471.]

Here again, the Court should note the careful use of language. It was not that the *railroads* refused to enter into through arrangements that mattered to the ICC; it was only that the parties complaining of the discrimination had themselves refused to construct the facilities physically essential to through service.

This point was made quite clear when the ICC held further hearings and issued still another opinion. 306 I.C.C. 167. An important development had occurred in the meantime. At some points, "berthing facilities for barges are provided, the docks are served by rail tracks, and with the equipment available under the arrangements with stevedores it is possible for grain to be transferred to cars for rail switching or line-haul

movement." *Id.* at 170. In other words, although the barge lines and rail carriers still did not physically connect, and although they had not previously held themselves out as offering through service, it was now possible for the grain to reach a railroad car from a barge. Therefore, the ICC concluded:

> * * * Although admittedly there is no physical connection between barge and rail except at a few points, nevertheless we feel compelled by the rationale of the Court's decision[34] to treat the situation as though the barge and rail carriers were in fact 'connecting carriers' within the meaning of section 3(4). [306 I.C.C. at 172.]

The ICC still did not go the whole way, however. While it granted relief under § 3(4) to ex-barge traffic out of Ohio River ports because rail rates were there published as separately established proportional rates, it declined to grant similar relief to ex-barge traffic out of Mississippi River ports because rail rates were there published as single-factor through rates. 303 I.C.C. at 471. When this conclusion was presented to the District Court, it was rejected. 176 F. Supp. 411. The effect of such a decision, said the court, would be that railroads could freely discriminate against ex-barge traffic simply by using unpublished divisions of a through rate rather than published proportional

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[34] The ICC was here referring, actually, to two decisions: *ICC* v. *A. L. Mechling Barge Line*, 330 U.S. 567 (1947), and *Dixie Carriers, Inc.* v. *United States*, *supra*, 351 U.S. 56. In the *Mechling* case, the Court held that the ICC could not lawfully permit railroad carriers to charge higher rates on ex-barge grain than on ex-rail grain. In the *Dixie Carriers* case, the Court held that the ICC could not permit railroad carriers to apply local rates to the handling of ex-barge sulphur where ex-rail sulphur was handled on a division of a joint rate.

rates. Such discrimination could not be tolerated, for this Court had made clear that "Congress imposed a duty upon the Commission to eliminate discrimination in whatever guise or form it exists." *Id.* at 418.

The District Court continued: "The contention is advanced with apparent seriousness by some of the intervening defendants that Arrow is not a connecting carrier in relation to the railroads which serve the Tennessee River ports. This argument is wholly without merit." Since the grain could actually be gotten aboard the railroads after being carried in the barges, Arrow was "a connecting carrier of the outbound rail carrier" under § 3(4) of the Act (*id.* at 419), even though intermediate facilities were necessary for transfer of the grain from barge to train.

The court also rejected the argument that "there must be either a finding by the Commission that through barge-rail routes exist via the Tennessee River ports or a finding under section 15(3) of the act that the public interest requires that they be established." If a discrimination exists, said the court, "the Commission has a duty to cure it." *Id.* at 420. This Court affirmed the District Court without opinion. 361 U.S. 353.

The *American Barge Line* case, of course, dealt with barge traffic, and it is part of the National Transportation Policy to preserve the inherent advantages of such traffic. 54 Stat. 899, 49 U.S.C.A. note preceding § 1. But this Policy does not differentiate or distinguish barge cases from the instant one. On the contrary, while the National Transportation Policy is an added reason for erasing anti-barge rates, and provides the *measure* for the discrimination, the fact is that everything decided in the *American Barge Line* case relating

to discrimination is equally applicable where one group of railroads is discriminating against another. This is so not only because of the broad language in the *American Barge Line* opinions, but also because § 3(4) itself makes no distinction between rail and water carriage. That section, in fact, specifically makes applicable to water carriage, without differentiation, the provisions against discrimination that control rail carriage.[35]

We submit that the *American Barge Line* case stands for several propositions that are applicable here: where there is discrimination, (a) no direct physical connection is necessary in order for there to be "connecting line" status; (b) there need be no presently-existing through route *in the sense* that all carriers, including the discriminating carriers, have heretofore held themselves out as offering through service on a regular basis; but rather (c) there need be only a series of connecting carriers *capable* of, and *available* for, handling through service but prevented from doing so by the discriminatory rates.

Precisely the same propositions are supported by another decision of this Court, *Chicago, I. & L. R. R.* v. *United States,* 270 U.S. 287 (1926). In that case, the South Bend Railroad connected at Michigan City with the Lake Erie Railroad. The Lake Erie in turn connected with both the Michigan Central and Monon Railroads, and the Monon in turn connected with the Pere Marquette Railroad. Thus, the Michigan Central, Monon and Pere Marquette had no physical con-

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[35] " • • • As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title." 49 U.S.C. § 3(4).

nection with the South Shore; they connected with it only by way of an intermediate carrier, the Lake Erie. At one time, the Lake Erie had refused to join in reciprocal switching arrangements with the South Shore even though it had these arrangements with its other three connections. The ICC ordered that discriminatory practice stopped. 58 I.C.C. 647 (1920). Now, however, the South Shore was attacking the practice by the Michigan Central, Monon and Pere Marquette of having reciprocal switching arrangements each with the other but not with the South Shore. The ICC ordered an end to that discrimination as well (88 I.C.C. 525), and the District Court denied an injunction without opinion.

Repeatedly in their brief to this Court, the three discriminating carriers urged that there could not possibly be a violation of § 3(4) of the Act because (a) they had no direct physical connection with the South Shore, and (b) there was no joint arrangement with the South Shore and no service being performed with it. This was, in fact, the principal point urged on appeal.[36]

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[36] Brief for Appellants, *Chicago, I. & L. R.R.* v. *United States*, No. 150, October Term 1925. Typical of their statements, for example, were the following: "Unlawful discrimination can not exist unless there is a physical connection by the carrier alleged to be guilty of the discrimination with the railroad or shipper claiming to be discriminated against, or a service being performed for the railroad or shipper discriminated against through the medium of joint routes or joint rates." *Id.* at 21, 25. "We earnestly contend that as a matter of law, there can be no discrimination against the South Shore and its shippers by either the Pere Marquette, the Monon or the Michigan Central, because these carriers do not come in contact with the South Shore, nor have any joint arrangement with it and the intermediate line of the Lake Erie and Western, whereby they serve the South Shore and its shippers. There is neither service being performed by these three carriers in connec-

The United States in its brief took a very simple view of the case: "The fact that the Lake Erie & Western will be required, if reciprocal switching is maintained, to act as an intermediate carrier of traffic to or from South Shore is an accident of location and not a transportation difference."[37] The ICC in its brief also thought it clear that "Absence of physical connection between the South Shore and three of appellants can not, as a matter of law, justify the discrimination practiced against the South Shore and its shippers."[38] The ICC conceded that through rates and arrangements were not in effect between the three appellants and the South Shore as a carrier (*id.* at 23), but it considered this irrelevant. And in so arguing, it relied on cases dealing with *rates* and concluded that the same principles applied in a case involving switching arrangements. *Id.* at 27, 29.

This Court agreed with the United States and the ICC, and affirmed. It specifically stated that none of the three appellant railroads "had established through routes or joint rates with the South Shore to points

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tion with the South Shore, nor a physical contact with the South Shore by these three carriers, and therefore, an ability to perform the service." *Id.* at 28. "So in this case, how can it be said that the Pere Marquette, which does not come in contact with the South Shore, does not have any through routes or rates in effect with the South Shore, and does not in any manner serve that line, is unjustly discriminating against it?" *Id.* at 29. "This, we believe, illustrates the point that unlawful discrimination can not exist unless there is physical contact with the railroad or shippers claiming to be discriminated against, or service being performed for them through the medium of joint routes or joint rates." *Id.* at 31.

[37] Brief for the United States, *Chicago, I. & L. R.R.* v. *United States*, p. 6.

[38] Brief for Interstate Commerce Commission, *Chicago, I. & L. R.R.* v. *United States*, p. 25.

on its line. Each of them refused to enter into an arrangement with it for reciprocal switching. But each of [them] had an arrangement for reciprocal switching with each of the others. Thus the South Shore still remained at a disadvantage in handling traffic at Michigan City." 270 U.S. at 291. The Court therefore had no difficulty in finding that discrimination existed under § 3 of the Act and that it must be eliminated.

> * * * It is argued that, as a matter of law, a carrier cannot be guilty of unjust discrimination unless it is able by its own act to remove the inequality; that where there is no direct physical connection with the railroad alleged to be discriminated against, and no joint service is being rendered by the three steam railroads with the South Shore, there cannot, in law, be unjust discrimination, because the existing inequality can be removed only by the consent of a third party, the intermediate carrier.
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> The order does not require the steam railroads to extend any service to the South Shore. It leaves them free to remove the discrimination by any appropriate action. * * * Direct physical connection with the carrier subjected to prejudice is not an essential. *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U.S. 136, 144. Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury. *United States* v. *Pennsylvania R. R. Co.,* 266 U.S. 191, 197-9. [270 U.S. at 292-293.]

The same point is again illustrated by the *Denver & R. G. W. R. R.* case.[39] There the Union Pacific in most instances kept its long haul between west and east. The Rio Grande, which ran only from Ogden eastward to Denver, was attempting to force the Union Pacific to enter into joint rates which would allow the Rio Grande to participate in transcontinental traffic. In all respects but one, the case is distinguishable from the instant one, because (a) the Rio Grande asked the ICC to establish joint rates under § 1 on through routes which it claimed were already in effect,[40] and (b) the Rio Grande competed with a small section of a transcontinental line entirely maintained by the Union Pacific.[41] However, in one respect the two cases are similar. On some products the Union Pacific interchanged at Ogden with the Bamberger Railroad and accorded that railroad joint rates to and from various points, including Salt Lake City. Even though there were no through routes in effect on a competing stretch via the Rio Grande, the ICC held that the Union Pacific was violating § 3(4) by not joining in similar rates with the Rio Grande. 287 I.C.C. at 658-659. The Dis-

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[39] *Denver & R. G. W. R. R.* v. *Union Pacific R. R.*, 287 I.C.C. 611 (1953), *remanded sub nom. Denver & R. G. W. R. R.* v. *United States*, 131 F. Supp. 372 (D. Colo. 1955), *rev'd in part sub nom. Union Pacific R. R.* v. *United States*, 132 F. Supp. 72 (D. Neb. 1954), *aff'd and rev'd in part*, 351 U.S. 321 (1956).

[40] The ICC held that such routes were not in effect, but that the public interest required them under § 15. Therefore, the ICC established such routes, and joint rates over them, for many products.

[41] The point is illustrated by a drawing in the Brief for the United States, the Interstate Commerce Commission, and the Secretary of Agriculture, *Denver & R. G. W. R. R.* v. *Union Pacific R. R.*, Nos. 117, 118, 119, 332, 333 and 334, October Term 1955, p. 60.

trict Court squarely held that "Section 3(4) clearly prohibits such discrimination."[42]

Thus, a "through route" in the sense that the term is used in the Act itself[43] is not essential to a finding of discrimination under § 3(4). And we have already shown that a physical connection is not necessary. The irrelevance of a physical connection was established by the lower courts soon after the passage of the Act. In *Augusta S. R. R.* v. *Wrightsville & T. R. R.*, 74 Fed. 522 (S.D. Ga. 1896), under what is now 49 U.S.C. § 2, the Augusta Southern Railroad alleged discrimination because the Wrightsville & Tennille Railroad charged it higher prices for transporting continuing traffic than it did the Central of Georgia Railway. The Wrightsville replied in part that it did not connect with the Augusta—that it joined with that line only over the right of way of the Central. The court dismissed this as of no moment.

The same point was established by this Court almost 50 years ago, when a carrier claimed that it could not be guilty of a discrimination against a locality because it had no physical connection with that locality. The Court replied: "Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them." *St. Louis South-*

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[42] 132 F. Supp. at 81. While this Court had no occasion to consider most contentions raised under § 3(4) (see 351 U.S. at 335), it did approve the holding of the District Court relating to the Bamberger Railroad. 351 U.S. at 335 n. 7.

[43] Even within the Act, the term is a flexible one. See *Denver & R. G. W. R. R.* v. *Union Pacific R. R., supra*, 351 U.S. at 327. It does not necessarily entail joint rates or uninterrupted carriage. *United States* v. *Capital Transit Co.*, 325 U.S. 357, 363 (1945). See also *St. Louis Southwestern Ry.* v. *United States*, 245 U.S. 136, 139-140 n. 2 (1917).

western Ry. v. *United States,* 245 U.S. 136, 144 (1917). Time and again, when the parties discriminated against have been carriers instead of localities, the courts have reached the same conclusion.[44]

Yet appellees' entire argument is that because they do not physically connect with Western Pacific at Portland, and because they have refused in the past to grant the Bieber route the same preferential rate accorded the competing Southern Pacific route, they cannot be compelled to cease the discrimination. This latter argument is analogous to the one made by the Fernwood & Gulf Railroad in *United States* v. *Illinois Central R. R.,* 263 U.S. 515 (1924). There, the Fernwood & Gulf was an independent line connecting the cities of Knoxo and Fernwood. At Fernwood, it joined the Illinois Central for shipment of traffic to northern points. The rates of the Illinois Central from points on its own lines, from points on its branch lines, and from points on other connecting lines were higher than the combination of rates from Knoxo to northern cities via the Fernwood & Gulf and the Illinois Central through Fernwood. The Fernwood & Gulf argued that it was not subject to a § 3 order because it was not a party both to the preferential rate and the higher rate; it participated only in the higher rate. It also argued that the Illinois Central was not subject to a § 3 order because Knoxo was not on Illinois Central's lines, and therefore Illinois Central was not in a position to remove the discrimination.

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[44] In addition to the cases already discussed in this brief, see *Atchison, T. & S. F. R. R.* v. *Chicago,* 240 F.2d 930, 937 n. 17 (7th Cir. 1957), *aff'd,* 357 U.S. 77, 86 (1958); *Texas & Pacific Ry.* v. *United States,* 42 F.2d 281, 285 (S.D. Tex. 1930), *rev'd on other grounds,* 289 U.S. 627, 648-649, 669-670 (1933).

The ICC, in its brief to this Court, had a quick answer: "This question has been before the Commission literally hundreds of times and the Commission has always held that it was not without power to remove a prejudice arising from the improper relationship of two rates, when one or more carriers were parties to both rates, simply because one of the carriers which participated in transportation under the one rate did not participate in transportation under the other rate." [45]

This Court agreed. "Proceedings to remove unjust discrimination are aimed directly only at the relation of rates." 263 U.S. at 520. It made no difference that each line did not participate in both rates. *Id.* at 520-521. It made no difference that the discrimination was practiced by Illinois Central solely to increase its own business. *Id.* at 523-524. It made no difference that the rates were combination rather than joint rates. *Id.* at 527. The discrimination still had to cease.

And so here, the fact that appellees have heretofore refused to join in equal rates cannot disguise the ultimate fact that the rates granted to one competing line discriminate against the other. The Commission has the power and the duty to erase the discriminatory rates.

That the removal of discrimination does not rest upon physical connection or previous offers of through services by the discriminating carriers is further illustrated by *Pennsylvania Co.* v. *United States,* 236 U.S. 351 (1915). That case, although a switching case, was decided under § 3, and its rationale is equally applicable

[45] Brief for the Interstate Commerce Commission, *Wyoming Ry.* v. *United States,* No. 38, October Term 1923, pp. 18-19, *decided sub nom. United States* v. *Illinois Central R.R., supra.*

here. The Rochester Railroad operated its own train to Butler, Pennsylvania, where its cars were moved (by virtue of a lease arrangement) over the lines of the Allegheny Railroad to a station within 1000 feet of the Pennsylvania Railroad's terminal facilities in New Castle.[46] The Pennsylvania made its switching facilities available to three other carriers, because these three in turn offered reciprocal arrangements which were advantageous to the Pennsylvania. But because the Rochester could not offer such reciprocal arrangements, the Pennsylvania completely refused to handle the Rochester's cars when they passed over the Allegheny's lines and came to a stop within 1000 feet of the Pennsylvania's facilities. There were no through routes or joint rates as between the Pennsylvania and Rochester; there was, in fact, no service at all.[47]

The Rochester asked the ICC (a) to establish through routes and joint rates under § 15 on traffic tendered to the Pennsylvania, and (b) to forbid under § 3 the discrimination practiced by the Pennsylvania. The ICC found it unnecessary to establish through routes and joint rates, because it ordered the discrimination halted.

This Court did not give the slightest heed to the fact that the Rochester's cars had to pass over another carrier's lines in order to reach New Castle, or that even there the cars stopped just short of the Pennsylvania's facilities. Nor did the Court pay any attention to the lack of a through route, except to treat it

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[46] *Id.* at 356, 359; Transcript of Record, *Pennsylvania Co.* v. *United States,* No. 591, October Term 1914, pp. 21-22.

[47] 236 U.S. at 356-357, 359; Brief for the United States, *Pennsylvania Co.* v. *United States, supra,* at p. 4.

as evidence of the discrimination itself. The Court held that there was discrimination in fact, and that the reasons for the discrimination were irrelevant. 236 U.S. 351.

Repeatedly, the Court has made clear that a direction to stop discriminating is not to be confused with the establishment of through routes and rates. For the Commission to establish routes and rates as such, it must comply with §§ 1 and 15, so that there must be findings that the parties themselves affirmatively or impliedly entered into certain arrangements, or that the public interest requires such arrangements. But an order to stop discriminating under § 3 can be complied with in various ways. The discriminating carriers can establish equivalent rates with the parties discriminated against, they can cancel their rates with the favored parties, or they can take other steps to see that the discrimination ceases.[48] As the Court said in *United States* v. *Pennsylvania R. R., supra,* 266 U.S. at 199:

> It is true that an extension of trackage rights, an enlarged common use of terminals, or the establishment of through routes and joint rates, or the withdrawal of them, could not be ordered except upon the findings and conditions prescribed in the act. But the order complained of does not require any such thing. It requires only that the carriers shall desist from a practice which involves such

[48] *E.g., New York* v. *United States,* 331 U.S. 284, 340-343 (1947); *L. T. Barringer & Co.* v. *United States, supra,* 319 U.S. at 10-12; *Texas & Pacific Ry.* v. *United States,* 289 U.S. 627, 650 (1933); *United States* v. *Illinois Central R.R.,* 263 U.S. 515, 520-521 (1924); *American Express Co.* v. *South Dakota ex rel. Caldwell,* 244 U.S. 617, 624-625 (1917). See also the Motion of the United States and Interstate Commerce Commission to Affirm, *Thompson* v. *United States,* No. 513, October Term 1951, p. 11.

use as has resulted and will result in the undue prejudice found. The order leaves them free to remove the discrimination by any appropriate action.

The ICC has pointed out that a few isolated shipments over a route cannot establish a through route for purposes of § 15, because otherwise a shipper or carrier could avoid the restrictions in that section simply by making a shipment or two over the route which he seeks to open commercially.[49] We agree with that analysis. But the coin has two sides, and the other side is that a carrier cannot grant favored rates to one line and avoid granting them to competing lines by the simple expedient of refusing to join the competing lines in offering through service. That is precisely what appellees are attempting to do here. Surely if discrimination may be practiced *by* "a combinaiton of connecting lines,"[50] discrimination may also be practiced by one or more railroads *against* "a combination of connecting lines." Certainly the fact that the carriers making up the Bieber route compete with the Southern Pacific route is no *excuse* for discriminatory rates.[51]

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[49] *Denver & R. G. W. R. R.* v. *Union Pacific R. R., supra,* 287 I.C.C. at 619.

[50] *Texas & Pacific Ry.* v. *United States, supra,* 289 U.S. at 648-649; *Central R. R. of New Jersey* v. *United States,* 257 U.S. 247, 259 (1921); *Omaha Grain Exchange* v. *United States,* 194 F. Supp. 929, 935 (D. Neb. 1961).

[51] Very early in its history, the ICC specifically rejected the contention that "it is not unduly discriminatory, under section 3 of the act, for an initial carrier to agree upon joint through rates with one of several connecting carriers which are competitors among one another." *Pacific Navigation Co.* v. *Southern Pacific Co.,* 31 I.C.C. 472, 480 (1914). See also *Seaboard Air Line Ry.* v. *United States,* 254 U.S. 57, 62 (1920).

We have shown that nothing in the legislative history of the Act and nothing in the cases inveighs *against* our interpretation of "connecting lines." We go further. The legislative history and the cases affirmatively support the position we take. For if one fact is crystal clear, it is that Congress intended in § 3 to outlaw discrimination in all its forms. The United States flatly told this Court over 30 years ago that "Section 3 forbids discrimination of any kind whatsoever."[52] The Court agreed then, and it has agreed ever since.

> The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at. * * * This court has said that the language of the Act "is certainly sweeping enough to embrace all of the discriminations of the sort described which it was within the power of Congress to condemn." [*Louisville & N. R.R.* v. *United States,* 282 U.S. 740, 749-750 (1931).]
>
> [Section 3] forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality * * *. [*Pennsylvania Co.* v. *United States, supra,* 236 U.S. at 361.]
>
> Wherever discrimination is, in fact, practiced, an order to remove it may issue * * *. [*Chicago, I. & L. R.R.* v. *United States, supra,* 270 U.S. at 292-293.]
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> The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations. [*New York* v. *United States, supra,* 331 U.S. at 296.]

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[52] Brief for the United States, *Wyoming Ry.* v. *United States,* No. 38, October Term 1923, p. 10; Brief for the United States, *United States* v. *Illinois Central R. R.,* No. 40, October Term 1923, p. 11, both *decided sub nom. United States* v. *Illinois Central R. R.,* 263 U.S. 515 (1924).

> Section 3 outlaws discrimination in all its forms. [*Dixie Carriers, Inc.* v. *United States. supra,* 351 U.S. at 60.]

See also *Kansas City Southern Ry.* v. *C.H. Albers Com'n Co.,* 223 U.S. 573, 597 (1912); *Houston, E. & W. T. Ry.* v. *United States,* 234 U.S. 342, 355-356 (1914); *United States* v. *Pennsylvania R.R., supra,* 266 U.S. at 197-199; and *A. L. Mechling Barge Lines, Inc.* v. *United States, supra,* 376 U.S. at 384-385.

The cases and legislative history to one side, the practical effects of the holding below should be carefully noted. If a railroad like Western Pacific competes as an intermediate carrier rather than by means of a direct physical connection at the common interchange, the District Court takes the position that before that railroad can challenge discriminatory rates, the discriminating carriers must previously have held themselves out as offering through service over the intermediate railroad's route. What this means in practical effect is that where a discrimination consists of through rates *at different levels,* it can be attacked, but where the discrimination consists of one through rate and a refusal to grant the other through rate at all, it cannot be attacked. To illustrate: if appellees had voluntarily joined the Bieber route in through rates which were lower than the rates now prevailing and yet still higher than those maintained with Southern Pacific, the District Court would not have questioned Western Pacific's right to challenge the discriminatory practices under § 3(4). Yet the District Court denies the right of Western Pacific to sue in this case, even though the rates are *more* discriminatory than in the illustration above.

The irrationality of the District Court's conclusion is again pointed up by the fact that if a few physical

circumstances happened to be different, the District Court would have granted relief, even though the practical facts of discrimination would have been the same. For example, if the Western Pacific had been the northern instead of the middle link in the Bieber route, the District Court would have allowed it to sue, because it would have physically connected with appellees. See R. 703. And if appellees had discriminated *in favor of* Western Pacific instead of *against* it, Southern Pacific could have sued, because it too connects with appellees. Yet because Western Pacific happens to be the victim of the discrimination and the middle link in a chain of carriers, the District Court says it lacks standing. This, we suggest, simply makes no sense, and certainly is not required by the Act.

The appellees have not previously held themselves out as offering through service over the Bieber route for only one reason: to preserve the discriminatory rates that are attacked in this case. Their discrimination thus serves not only as the point of attack but as its own defense. Surely that cannot be the intent of Congress. Rather, we agree with what the Southern Pacific said recently in another case about the National Transportation Policy's requirement of fostering sound economic conditions and promoting adequate service.[58] Repeatedly in that case, Southern Pacific stressed the need for preserving "the present competitive strengths" of the Bieber and Southern Pacific routes (*id.* at 4), requiring "equal treatment" for each connection (*id.* at 5), assuring connecting carriers "the same treatment" (*ibid.*), and carrying out

[58] Reply of Intervenor Southern Pacific Company to Exceptions, served March 11, 1945, *Great Northern Pacific & Burlington Lines, Inc., etc.*, Finance Dkt. Nos. 21478, 21479, 21480, p. 4.

the intent of Congress "that the exercise of such power to discriminate is against the public interest." *Id.* at 6. These are precisely the needs we are attempting to make real in the instant case. Western Pacific is an established carrier offering its service over an established physical route. Action which frustrates the full, fair and efficient utilization of existing facilities clearly violates the legislative purpose as expressed in the National Transportation Policy. This is particularly true where the action is discriminatory in nature.

Here, we have not only a lack of utilization but serious injury as well. Distinct areas of injury to Western Pacific are its loss of line-haul traffic which it originates or terminates; loss of important industries that, absent the complained-of rate discrimination, would have located on its facilities and produced revenue traffic to this and other territories served by Western Pacific; and complete foreclosure from the opportunity of offering its service in connection with the movement of approximately 25,000 carloads of normally competitive traffic presently monopolized by Southern Pacific. R. 90. The injury to shippers, the public and the Pacific Coast has already been detailed above.

In a recent decision, the ICC held unequivocally that Western Pacific must remain an independent carrier so that it can perform as an effective competitor of Southern Pacific via the Bieber gateway and elsewhere. In issuing its mandate, the ICC stated:

> Similarly, the Washington Commission's support of the Santa Fe proposals is based on its desire to preserve competing routes between California and the Pacific Northwest. It contends that control of Western Pacific's route through the Bieber, Calif., gateway by Southern Pacific would deprive

shippers of a choice of carriers on movements between the Pacific Northwest and points to the south and southeast.

* * *

If these coordination savings * * * are weighed against the possible losses in traffic and revenue by most of the intervening carriers; the losses in car rentals by the Fruit Express and Bangor Road; the loss of employment by employees of the affected carriers; *the possibility of downgrading the Bieber or central routes for overhead traffic movements with resulting hardships upon shippers originating or terminating traffic on these routes; and the elimination of one of the active competitors for rail traffic in the western region;* it is clear that the adverse effects which would flow from the approval of any of the control applications might exceed any benefits which would accrue to the public therefrom.[54]

Thus, the ICC has made it clear that the major reason for Western Pacific's very existence is to serve the public through its competitive efforts. Manifestly, such a mandate requires the tools of performance before it can be followed. Competitive rail service can survive the absence of one or even more of the various tools of the trade, but not the presence of discriminatory rates via common connections. Nowhere is that more graphically portrayed than in the situation now prevailing on the Pacific Coast of the United States.

Wherever equal rates and hence equal competitive opportunity exist, the Bieber route has performed most efficiently and economically, earning the respect and support of the shipping public. And this despite

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[54] *Southern Pacific—Control—Western Pacific Co., supra* n. 8, slip opinion pp. 23, 26-27; emphasis added, footnote deleted.

the relative size and wealth of the Southern Pacific. Requiring Northern Pacific and Union Pacific to afford each of their common connections equal rates would do no more than force Southern Pacific to face the same competition it already faces on traffic moving to or from Great Northern points in the same area. More importantly, regardless of what the effect may be on Southern Pacific, § 3(4) and the National Transportation Policy both require that this discrimination be brought to an end.

II. THE CIRCUMSTANCES AND CONDITIONS ARE SIMILAR AND REQUIRE EQUAL TREATMENT

The ICC held that "Even if the complainants were connecting carriers, the evidence of record does not establish the similarity of circumstances and conditions which justifies equality of treatment." R. 643. Although we believe we clearly established before the District Court that this finding was erroneous, it was not necessary for the court to pass on the point, since it concluded that Western Pacific was not a connecting line. R. 731 n. 3. As we pointed out in our Jurisdictional Statement (p. 6 n. 4), if this Court agrees with us that Western Pacific is a connecting line, a further remand is not necessary, because the record fully and unequivocally establishes a similarity of circumstances which requires equal treatment, even assuming that such similarity is necessary under the particular circumstances of the instant case.

We start with the obvious but important fact that whatever alleged unfavorable physical conditions might be inherent in the Bieber route have existed since the ICC authorized its construction for the very purpose of competing with the allegedly more favorably-en-

dowed Southern Pacific route.[55] Western Pacific's "unfavorable" operating conditions did not deter the ICC from authorizing the operation of the Bieber route—although these conditions were specifically considered by the ICC at the time[56]—nor have these conditions prevented the Bieber route from successfully competing wherever rates have been equalized. R. 31-35, 403, 404.

Moreover, the ICC's conclusion that Bieber route conditions are relatively unfavorable is founded upon a patently erroneous interpretation of uncontroverted facts in the record.

The ICC, for example, erroneously treated the Southern Pacific routes as a single line and conversely cast an unfavorable light upon the multi-line nature of the Bieber route. The discriminatory rates, however, are

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[55] The District Court was clearly troubled by this point during oral argument:

> Judge Merrill: I think what my brothers up here are troubled by is that the Commission in determining a lack of similarity of circumstances seems to have dealt overwhelmingly with the situation south of Portland rather than the situation north of Portland to which the Western Pacific would like to get access, and that as far as the situation south of Portland is concerned, the route was created for the purpose of competing with the Southern Pacific. It seems to be doing so vigorously, and how can it consistently be said under these circumstances that dissimilarity of circumstances south of Portland is a valid consideration in denying access to the Northwest? They are competing vigorously?
>
> Mr. Ginnane [Counsel for the ICC]: They are competing.
>
> Judge Merrill: They are created for the purpose of doing so. Now they are denied the opportunity of competing to the north because the circumstances somehow are dissimilar, even though any such dissimilarity is being overcome in a very competitive fashion. [R. 699.]

[56] *Great Northern Ry. Co. Construction, supra,* 166 I.C.C. at 39.

also applicable over joint Southern Pacific-Santa Fe routes via the northern California junctions of those carriers. R. 22, 30. Much of the Bieber route's alleged circuity, as compared to the Southern Pacific's single-line route, is in the Santa Fe segment extending south from Stockton to Los Angeles, and the same distance factor is present in the joint Southern Pacific-Santa Fe route. R. 329. Further, the discriminatory rates require the same multi-line handling on all traffic originating or terminating at Western Pacific's exclusive points,[57] since this traffic must be moved by Western Pacific to or from the nearest junction point before being carried by Southern Pacific. R. 26, 27. Multi-line handling is also involved at points served in common by both lines whenever the traffic originates or terminates at any industry which requires Western Pacific's switching service to or from Southern Pacific. R. 26, 27, 358. These are not uncommon or occasional occurrences, as evidenced by the fact that approximately 2250 to 2500 carloads of traffic each year are diverted from Western Pacific to Southern Pacific at plants or points served by Western Pacific alone. R. 95-96. All of this traffic, if retained by the carrier directly serving the facilities, would move to or from Portland on exactly the same number of railroads that are now required by the discriminatory rates.[58]

The ICC also found some significance in the Bieber route's slightly greater circuity between Los Angeles

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[57] "Exclusive points" as used here means California points served by Western Pacific but not by Southern Pacific.

[58] The same situation applies in the northwest where, as at Seattle, a shipper located on Northern Pacific can use the Bieber route by having Northern Pacific switch the car to Great Northern for handling to Portland, thence the Bieber route south. R. 130. If the routes south of Portland were equalized, only one carrier would handle the traffic between Seattle and Portland.

and Portland as compared to the shorter Southern Pacific route. There is no greater circuity on the Bieber route now than when it was constructed in 1931. In initially authorizing the construction and later in deciding to allow the Bieber route to reduce its rates to the same level as the Southern Pacific's reduced rates (to meet water competition), the ICC determined that the Bieber route's comparative circuity was "slight" and did not justify putting the carrier in a less favorable competitive position.[59]

Moreover, there is no direct correlation between length of railroad and quality of competitive service. For example, the witness for the Yakima Fruit Growers Association testified:

> * * * It frequently happens that we get as fast service from Yakima to Chicago, a distance of over 2,000 miles, as we get over the much shorter distance from Yakima to Los Angeles.
>
> At present our schedule to Chicago is fourth evening for fifth morning sale. This is a guaranteed schedule. The Northern Pacific-Southern Pacific route at present is sixth morning delivery to Los Angeles. The piggy-back schedule is fourth day arrival in Los Angeles for fifth morning sale. The Union Pacific schedule to Los Angeles is third day delivery.
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> It is my firm conviction that it is the existence of railroad competition which is responsible for

[59] *Pacific Coast Fourth Section Applications,* 190 I.C.C. 273, 290 (1932): "On the whole record we conclude that it would be in the public interest to permit this newly built route as far as the law allows to meet the water competition to the same extent as we permitted the Southern Pacific to meet the same competition * * *. We recognize the fact that the costs of handling traffic over *slightly circuitous* routes is generally not substantially in excess of that over the direct routes." (Emphasis added.)

the better service to the east. I firmly believe that if we had two competitive routes to California, the service would be immeasurably improved. If the Commission grants the relief sought by the Western Pacific and the rates become applicable, we would certainly utilize that service.

* * *

Q. Mr. Lindgren, you have testified that the Union Pacific schedule to Los Angeles is third day delivery. How is that traffic routed?

A. Through Salt Lake.

* * *

Cross examination.

* * *

Q. And do the same rates apply by way of the Union Pacific via Salt Lake City to Los Angeles, as applied by Portland and Southern Pacific?

A. Right.

Q. Well, then, why is it that you ever make shipments via Portland-Southern Pacific rather than Union Pacific to Los Angeles?

A. With a Union Pacific origin?

Q. Yes, with a Union Pacific origin.

A. We don't ship that way. We ship through Salt Lake. [R. 152-154.]

The present Union Pacific route between Los Angeles and the States of Oregon and Washington is the same one referred to in the Commission's decision authorizing creation of the Bieber route,[60] and the extent of its

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[60] "Generally speaking, the only part of California which now has the benefit of rail competition to or from points in Oregon and Washington is a small area around Los Angeles served by Union Pacific." *Great Northern Ry. Co. Construction, supra,* 166 I.C.C. at 34.

comparative circuity is graphically portrayed in the various maps in the record. R. 329, 466. The Union Pacific route is patently far more circuitous than the Southern Pacific and Bieber routes between the same points.

The ICC's error in the comparison of transit times (based on schedules rather than performance) was two-fold. First, although the evidence is directly to the contrary (R. 146, 147), the ICC accepted Northern Pacific's contention that the elimination of the present discriminatory practices would force Northern Pacific, in serving points east of the Cascade Mountains, to move Bieber traffic via a circuitous routing through Auburn (north of Portland and west of the Cascades) and then to points east. Northern Pacific interchanges with both Southern Pacific and the Bieber route in the very some terminal in Portland. Traffic interchanged with Southern Pacific, moving to or from Northern Pacific points located east of the Cascades, is carried over the lines of the Spokane, Portland & Seattle Railway (a subsidiary of both Northern Pacific and Great Northern systems) for "operating convenience" regardless of the routing shown on the bill of lading. R. 275. The Bieber-routed traffic interchanged at Portland need not and should not be handled in any different manner.[61]

The ICC also ignored the testimony that *present* schedules (which formed the sole basis for the Com-

[61] Since 1952 the pipe traffic moving over the Bieber route to points in the northwest Pacific located east of the Cascades has not been treated any differently than Southern Pacific traffic interchanged at Portland. The record shows a complete absence of the slightest criticism regarding the handling of the pipe traffic via the Bieber route.

mission's comparison) are based upon the fact that the only volume traffic now moving is in conjunction with Southern Pacific. Thus, a Union Pacific witness stated:

> We have made our schedules to conform with the schedules of the Southern Pacific. Since there is no traffic of any consequence whatever coming to us at Portland from the Bieber route, obviously we have no schedule set up with the Bieber route. [R. 263.]

While not predicating any exact findings on the subject, the ICC noted with apparent approval the contention of Union Pacific that the cost of its interchange at Portland is more excessive when the Bieber route is involved. R.638. Actually, the alleged cost comparisons do not even pretend to compare like with like. The Southern Pacific-Union Pacific interchange costs purport to be nothing more than the out-of-pocket costs for the engine crews involved in the service. R. 237. The alleged greater costs involved in a Bieber route interchange are predicated upon Union Pacific's share of the *total fully distributed* cost of operating the Northern Pacific Terminal Company (of which Union Pacific is part owner) and are based upon a *total ownership* cost responsibility bearing no relation whatever to the number of Bieber-routed cars moving through that facility, now or in the future. R. 241-244, 249. The fact is that an increase in the flow of traffic through the Terminal facilities must have the effect of *lessening* the per car cost of the individual owners.

Even assuming *arguendo* that Union Pacific's cost comparison was legitimate, the ICC has long ruled that differences in interchange arrangements are within

the operating control of the carriers, and hence should be worked out between the parties.[62] Western Pacific's annual revenue losses on traffic which either originates or terminates on its line but which must be surrendered to Southern Pacific for line-haul handling amounts to approximately $360,000, while the *alleged* extra cost to Union Pacific in handling the same 2500 cars via the Northern Pacific Terminal Company would approximate $7,500. R. 31, 226, 229. If Western Pacific were able to handle only an extra 10,000 cars annually (less than half of the potentially competitive traffic), its revenues thereon would be well in excess of $1,250,000 annually, from which any legitimate increased switching cost could and would be paid as increased divisions.[63]

Union Pacific's attempt to justify the present discriminatory practices on the basis of alleged differences in interchange conditions with common connections is completely rebutted by the testimony of its own

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[62] *Atlantic Coast Line R. R.* v. *Southern Ry. Co.*, 321 I.C.C. 283, 291 (1963); *Kansas City S. Ry.* v. *Louisiana & A. Ry.*, 213 I.C.C. 351, 359 (1935). See also *New York, C. & S. L. R. R.* v. *New York Central R. R.*, 314 I.C.C. 344, 345 (1961), where the ICC stated: "A carrier cannot arbitrarily provide points of interchange which ignore the basic rights of others. This is a matter to be arranged between the parties. Interchange agreements should be reached by consultation, exploration of mutual benefits and negotiation of differences."

[63] Union Pacific's Freight Traffic Manager testified on cross-examination:

> Q. If the divisions that have been offered to you on the same basis as what you are getting from the Southern Pacific were enlarged enough to make up for these alleged additional costs on the interchange, would that make a difference in the attitude of the Union Pacific?
>
> A. It might. [R. 221.]

Freight Traffic Manager. He confessed after some prodding that there are "not many" instances where Union Pacific gives through rates to one of its connections and denies them to another, whether or not conditions are the same. R. 220. In fact, he could not think of a single such instance other than the one involving the Bieber route, nor was any revealed by the rest of the record.

Finally, the ICC erroneously found that new routes would result from the elimination of the discriminatory rates and would require hauls in a general direction opposite to the direct movement. The fact of the matter is that no new physical routes would result. The existing facilities will handle the traffic—the only change will be in the rates applicable thereover, and consequently in the shippers' transportation costs. R. 221. Union Pacific and Northern Pacific will handle this traffic exactly the same distance north of Portland regardless of which route handles the traffic south thereof. The mere fact that the Bieber-routed traffic destined east of the Cascades would be carried west by the Bieber lines into Portland before it is handled by the Northern Pacific or Union Pacific does not impose upon *any* carrier a so-called "backhaul" obligation. *Ibid.*

The best possible evidence of similar conditions is the choice made by shippers between competing routes once these routes are commercially open. In this case, witnesses representing hundreds of individual shippers stated time and again that they would use the Bieber route if the discriminatory rates were erased. *E.g.*, R. 102-103, 107, 113, 119, 122, 126, 128, 130-131, 139, 149, 153, 155, 159, 162, 166-167, 251-252. And Northern Pacific's own General Freight Agent admitted that elimi-

nating the discrimination would "have the effect of dividing the traffic between the two lines, the Southern Pacific and the Western Pacific * * *." R. 284. If the Bieber route is circuitous or otherwise dissimilar, why would its commercial opening result in an immediate diversion of traffic from the theoretically more advantageous competing route?

Thus, the alleged lack of similar circumstances and conditions posited by the ICC simply will not withstand record analysis. This Court should so rule and should direct that the ICC enter an order requiring appellees' rate discriminations to cease.

CONCLUSION

The construction of the Bieber route was a competitive necessity in 1931. Since that time, the increasing consolidation of railroad services and facilities throughout the country; the economic growth of the Pacific area; the current and growing needs of shippers; the fact that "* * * existing competition by non-rail modes of transportation is not as effective in this area as in most areas * * *";[64] the sustained throttling of Western Pacific's competitive efforts; the carrier and public damage thereby inflicted; the economic waste patently inherent in preventing the full and fair utilization of already-existing facilities, all point to the need at the very least of bringing railroad competitive services to their irreducible minimum. This minimum requires that shippers have a practical choice between two fully available physical routes. It requires that one route, which, as the ICC has con-

[64] *Southern Pacific—Control—Western Pacific Co., supra* n. 8, slip opinion p. 19.

ceded (Motion to Affirm, p. 3), the appellees have attempted to keep "commercially closed," be opened.

The Western Pacific position rests solidly upon the proposition that any proceeding under § 3(4) requires both "connecting line" status and proof of different treatment between connecting routes operated under essentially similar conditions.[65] Therefore, no extensive litigation can, or will, follow a ruling that Western Pacific is a connecting line. Lines not operating under conditions essentially similar to those applicable over the preferred route will not be able to obtain any new or novel relief not contemplated by Congress or traditionally afforded by the courts. Connecting routes that find their competitors enjoying the benefits of discriminatory rate practices not justified by significant physical and operating differences will be able to challenge such discriminatory practices. This, we submit, is full compatibility between the statutory scheme and the relief sought by Western Pacific.

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[65] The ICC's General Counsel conceded in oral argument before the District Court that if Western Pacific is a connecting line and there is similarity of circumstances, the discrimination must be stopped. R. 697.

As one shipper pointedly put it (R. 140): "* * * there should be no delay in fulfilling the obligation to provide full service via the Bieber Gateway."

Respectfully submitted,

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